

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODERICK KENDALL TOLBERT,

Defendant-Appellant.

UNPUBLISHED
February 16, 2010

No. 288017
Wayne Circuit Court
LC No. 07-009968-FC

Before: Sawyer, P.J., and Saad and Shapiro, JJ.

PER CURIAM.

The jury convicted defendant of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. The trial court sentenced him to five years' imprisonment for the felony-firearm, and as a fourth habitual offender, MCL 769.12, to 26 to 50 years' imprisonment for the second-degree murder conviction and one to five years' imprisonment for the felon in possession conviction. We affirm defendant's convictions, remand to the trial court for resentencing on the second-degree murder conviction, and affirm his remaining sentences.

Defendant's convictions stem from the shooting death of Jackie Mullinax, whose body was found lying near the driveway of a vacant home in Detroit. Demetrius Moore testified that he worked for defendant, sold crack cocaine, and acted as the doorman at a crack house in Detroit.

The drug house caught fire on the afternoon of February 23, 2007. Later that evening, around midnight, Moore met up with defendant and Mullinax so they could find a new location from which to sell crack. According to Moore's trial testimony, defendant picked up Moore in a van. Mullinax was sitting in the back seat. After driving a short time, defendant stopped the van, turned around and fatally shot Mullinax in the head. Moore jumped out of the van and began running. He encountered Dwight Dawson, whom he asked for a ride home. Dawson agreed. While in Dawson's car, Dawson asked Moore what he was doing in the area and Moore "blurted out" that a man named Jay (later identified as defendant) had just shot Mullinax.

Defendant contends that the trial court erred three times in admitting hearsay evidence. We disagree.

Defendant objected to two of the three alleged errors. We review the preserved evidentiary errors for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). We review unpreserved error for plain error to determine if the error affects defendant's substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, a defendant must establish that: (1) an error occurred, (2) the error was plain, (3) and the plain error affected the defendant's substantial rights, i.e., it affected the outcome of the lower court proceedings. *Id.*

Defendant argues that the trial court erred in ruling that Moore's testimony concerning his statement to Dawson and Dawson's testimony concerning Moore's statement to him were admissible pursuant to the excited utterance exception. "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the rule against hearsay. MRE 803(2). The two primary requirements for excited utterances are: (1) that there be a startling event, and (2) that the resulting statement be made while under the excitement caused by the event. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). The crux of the second requirement is whether the statement was made before there was time to contrive and misrepresent, and whether it related to the circumstances of the startling occasion. *Id.* at 550-551.

The trial court did not abuse its discretion in admitting the challenged testimony of Moore and Dawson on the basis of the excited utterance exception. Moore testified that he was frightened after witnessing the shooting. He jumped out of the van and ran down the street, fearing for his life. Shortly thereafter, he encountered Dawson and secured a ride home, during which he relayed that defendant had just shot Mullinax. Moore's statement related to a startling event, the shooting of Mullinax, and Moore appeared to be under the stress or excitement of that event. Dawson confirmed Moore's testimony that Moore was frightened during their encounter. Though Dawson testified that Moore got calmer as time progressed, this does not compel a finding that Moore was no longer under the stress and excitement of the shooting when he made his statement to Dawson. Although it is unclear how much time elapsed between the shooting and the time that Moore made the challenged statement, it does not appear to have been more than a few minutes. There is no requirement that the excited utterance take place within seconds or moments of the startling event. *People v Kowalak*, 215 Mich App 554, 559; 546 NW2d 681 (1996) (upholding a 30 to 45 minute lapse and stating that there can be no definite and fixed limit of time in determining whether a declaration comes within the excited utterance exception). The trial court did not err in admitting Moore's statement.

Likewise, Dawson's testimony was covered by the excited utterance exception. Dawson testified that Moore told him that defendant shot Mullinax. For the reasons stated above, Moore's statement, as testified by Dawson, falls within the excited utterance exception.

Finally, the trial court did not err in allowing the prosecutor to read into evidence Moore's statement to police that defendant had asked him immediately prior to the murder, to shoot Mullinax. When the prosecutor questioned him at trial, Moore responded that he did not remember defendant's request. The prosecution proceeded to read Moore's statement into evidence.

Evidence of a prior inconsistent statement made by a witness is admissible for impeachment purposes although the statement tends directly to inculcate the defendant. *People v*

Kilbourn, 454 Mich 677, 682; 563 NW2d 669 (1997). Moore's prior statement to police was admissible to impeach Moore's trial testimony. See *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995), stating that "[w]hen a witness claims not to remember making a prior inconsistent statement, he may be impeached by extrinsic evidence of that statement." The trial court gave a limiting instruction that prior inconsistent statements could only be considered for impeachment purposes and not as substantive evidence. Accordingly, the trial court did not err in admitting Moore's statement for impeachment purposes.

Defendant also says that the trial court erroneously permitted the prosecutor to engage in improper rebuttal of prosecution witness Officer Moises Jimenez. We disagree. This Court's review of unpreserved evidentiary error is limited to whether the error affected substantial rights. *Carines*, 460 Mich at 762-763.

Defense witness Kristina Head testified that she was with defendant at her home at the time of the shooting. Head testified that although Officer Jimenez, the officer in charge of the case, approached her at defendant's preliminary examination, she did not tell him that defendant was with her on the night of the shooting. Head further testified that Officer Jimenez never came to her house. She admitted that the officer came to a house in River Rouge where she previously lived and spoke to her sister, but that Head did not live there at the time and was not present. The prosecution subsequently called Officer Jimenez as a rebuttal witness. He testified that he spoke with Head at the River Rouge home about his investigation. He corroborated Head's testimony regarding the preliminary examination.

Rebuttal evidence is admissible to contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same. *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it is cumulative of evidence admitted in the prosecutor's case in chief. *Id.*

Officer Jimenez's testimony concerning encountering Head at the River Rouge address was proper rebuttal testimony because it directly contradicted Head's testimony that she never encountered Officer Jimenez at the River Rouge address. Officer Jimenez's testimony regarding Head's failure to report the alibi when she saw him at the preliminary examination was also proper rebuttal testimony. The officer's testimony was responsive to defendant's alibi defense. By eliciting the rebuttal testimony, the prosecution was attempting to suggest that if Head was with defendant during the time of the shooting, she would have relayed this information to the officer at the preliminary examination and when he approached her and wanted to discuss the case.

Even assuming evidentiary error, defendant fails to demonstrate prejudice. As the prosecution observes, Officer Jimenez's rebuttal testimony was relatively brief and did not play a critical role in the case. The untainted evidence against defendant was significant. Moore testified that he witnessed defendant shoot Mullinax. Dawson testified that Moore told him that defendant shot Mullinax. Defendant suggested that Moore could have been the shooter, however, he presents nothing in support of that theory. Although defendant denied being the

shooter, determinations of credibility rest with the trier of fact. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). The evidence was sufficient to prove that defendant committed second-degree murder, felony-firearm, and felon in possession of a firearm.¹

Defendant alleges several instances in which Officer Jimenez engaged in serious misconduct which deprived him of his due process right to a fair trial. We disagree. Defendant's unpreserved claim is reviewed for plain error affecting his substantial rights. *Carines*, 460 Mich at 762-763.

A criminal defendant has a due process right to a fair trial. *People v Goss*, 446 Mich 587, 611; 521 NW2d 312 (1994). Defendant argues that Officer Jimenez engaged in misconduct denying him a fair trial when he failed to attempt to retrieve the missing shirt and shoes that Moore was wearing when he fled the scene of the shooting. Defendant does not indicate how the production of the shirt and shoes would be favorable to his case. Nor does defendant support his argument that the police had a duty to try to procure the clothing items. The evidence known to the police pointed to defendant as the shooter. Officer Jimenez's decision not to seek to retrieve Moore's clothing items was reasonable and does not constitute misconduct.

Defendant also argues that the officer engaged in misconduct by failing to establish the relationship between Moore and the son of defendant's alleged girlfriend. Moore did not testify that he had in-depth knowledge of defendant. Defendant does not explain how this would affect the outcome of the case. Officer Jimenez did not engage in misconduct.

Defendant asserts that Officer Jimenez engaged in misconduct by concealing Moore's failure to identify defendant until the preliminary examination. There is no evidence of the officer's concealment. Moore testified at the preliminary examination and at trial that he observed defendant commit the shooting. Even if the preliminary examination was the first time that Moore identified "Jay" as defendant, this would not constitute error. Defendant fails to demonstrate misconduct that affected the outcome of the trial.

Defendant contends that Officer Jimenez committed misconduct when he failed to inform the trial court of the original identification of defendant that was made by two witnesses, Cindy Blakely and Henry Smith, who were admitted drug users and who based their identification of defendant on his alleged nickname "Jay." Defendant does not substantiate his characterization of these witnesses as "questionable" or explain why they could not have accurately identified him. Also, defendant has no basis to suggest that Officer Jimenez engaged in misconduct by failing to inform the trial court of the alleged questionable nature of the two witnesses. These witnesses

¹ The elements of second-degree murder are: (1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death. *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). The elements of felony-firearm are: (1) the possession of a firearm (2) during the commission of, or the attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). The elements of felon in possession of a firearm include a previous felony conviction and possession of a firearm. *People v Perkins*, 473 Mich 626, 629-631; 703 NW2d 448 (2005).

did not testify at trial. Moore's testimony was sufficient to identify defendant as the shooter. Any alleged error regarding the two challenged witnesses was not consequential. Defendant does not establish prejudicial error on this point.

Finally, defendant claims that Officer Jimenez engaged in misconduct by failing to inform the trial court that he did not investigate the veracity of Moore's claim that he called defendant very shortly after the shooting. Defendant has not offered any details upon which Moore's claim would have been favorable to him. Whether Moore called defendant after the shooting was not a critical point of contention. Defendant cannot demonstrate that Officer Jimenez's failure to investigate resulted in prejudicial error.

Defendant also avers that the prosecution committed a *Brady*² violation by failing to turn over the complete set of tape recordings of phone calls defendant made while in jail. We disagree. Defendant's unpreserved claim is reviewed for plain error affecting his substantial rights. *Carines*, 460 Mich at 762-763.

Defendant indicates that he was provided with some of the tapes, but the prosecution did not cede to his request for all of them. According to defendant, the missing tapes would have allowed him to impeach Moore with evidence that (1) Officer Jimenez showed Moore a photo array containing defendant and defendant's brother, (2) defendant did not initiate the contact between Moore and defendant, and (3) Moore never told defendant to stop calling him.

Due process requires that a criminal defendant have access to certain information that the prosecutor possesses. *Brady*, 373 US at 87. In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant, (2) that the defendant did not possess the evidence and could not have obtained the evidence with reasonable diligence, (3) that the prosecutor suppressed favorable evidence, and (4) a reasonable possibility that had the prosecutor disclosed the evidence, the outcome of the proceedings would have been different. *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005).

It is not clear from the record whether the prosecution provided defendant with all of the tapes in its possession. Assuming that there were additional tapes and the tapes contain the evidence that defendant suggests, defendant nonetheless cannot establish a *Brady* violation. Although defendant argues that the missing tapes would have been favorable to him because they would have allowed him to impeach Moore, we are unable to locate any of Moore's testimony which could have been impeached by the evidence that defendant claims is on the missing tapes. Assuming that the missing evidence could somehow be construed as favorable, defendant cannot establish the prejudice prong of the *Brady* test. As discussed above, the untainted evidence against defendant remained strong. Defendant's *Brady* claim cannot be sustained.

Defendant also asserts that the trial court committed sentencing errors by misscoring several variables and by failing to find Prior Record Variable (PRV) 7 unconstitutional. We

² *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

agree that PRVs 1 and 3 are misscored, entitling defendant to resentencing. We disagree with defendant's remaining sentencing claims.

The alleged errors are both preserved and unpreserved errors. Defendant's preserved scoring errors are reviewed for an abuse of discretion to determine whether the evidence adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Defendant's unpreserved claims are reviewed for plain error affecting his substantial rights. *Carines*, 460 Mich at 762-763.³

Defendant argues that the trial court erred in assessing him ten points for PRV 3, which is scored for prior high severity juvenile adjudications. MCL 777.53. Ten points are properly assigned under this variable where the defendant has one prior high severity juvenile adjudication. MCL 777.53. Defendant claims that he has no juvenile adjudications which fall into this category, while the prosecution points to the PSIR's listing of an April 1997 juvenile adjudication for "VCSA Cocaine with Intent" as support for the trial court's score. VCSA refers to a violation of the controlled substances act. It is not clear from the PSIR or any other documentation what the specific charge was. PRV 3 requires a ten-point score for adjudications of crimes listed in class M2, A, B, C, or D, or adjudications punishable by a maximum term of imprisonment of ten years or more and not listed in any crime class. MCL 777.53(2). Drug offenses and the crime class into which each falls varies greatly. Without additional information on the exact charge, we cannot determine whether a ten-point score was authorized by PRV 3. We find insufficient evidence to support a ten-point score.

Defendant further argues that the trial court erred in assessing him 25 points under PRV 1, which is scored for prior high severity felony convictions. MCL 777.51. Twenty-five points are appropriate where the defendant has one prior high severity felony conviction which was entered before the commission of the sentencing offense. MCL 777.51. The prosecution concedes that the assessment of 25 points was erroneous because the conviction for the PRV 1 score (possession with intent to deliver) was entered after the commission of the sentencing offense. Thirty-five points should be deducted from defendant's PRV score because the trial court erred in assessing 25 points for PRV 1 when it should have assessed zero points, and erred in assessing ten points for PRV 3 when it should have assessed zero points. This point recalculation changes defendant's guidelines range from 315 to 1050 months or life to 270 to 900 months or life. The minimum sentence imposed, 312 months, still falls within the correctly scored guidelines. Nonetheless, defendant is entitled to resentencing because he was sentenced on an incorrect guidelines range. See *People v Francisco*, 474 Mich 82, 90-92; 711 NW2d 44 (2006) (stating that a defendant is entitled to resentencing where his sentence is based on an incorrect guidelines range). On remand, the trial court must utilize the correctly scored

³ One of defendant's unpreserved arguments concerns the alleged misscoring of Offense Variable (OV) 8. Because of the failure to previously raise this issue and because defendant's sentence would still fall within the appropriate guidelines range if OV 8 was rescored to defendant's liking, the OV 8 issue is unpreserved and not appealable. See *People v Kimble*, 470 Mich 305, 310; 684 NW2d 669 (2004).

guidelines range and sentence defendant within their range or enunciate substantial and compelling reasons for its departure.⁴

Defendant argues that the scoring of points under PRV 7 results in impermissible “double counting” because the conduct considered under PRV 7 has already been considered by the offense variables. We do not agree. PRV 7 is concerned with whether defendant has incurred concurrent or subsequent felony convictions. MCL 777.57. The offense variables encompass various factors which assess the nature of the sentencing offense. The existence of some overlap between PRV 7 and the offense variables, does not require us to find that impermissible double counting has occurred. Defendant’s claim does not succeed.

Finally, defendant claims that the PRV 7 statute, MCL 777.57, is void for vagueness. Defendant points out that although the prior record variables are intended to assess *prior* criminal history, PRV 7 requires assessing points for concurrent and subsequent convictions. According to defendant, this renders PRV 7 unconstitutionally vague because it does not provide individuals with fair notice that concurrent and subsequent convictions are scored under the prior record variable scheme.

A statute is accorded a strong presumption of validity, and this Court has a duty to construe it as such absent a clear showing of unconstitutionality. *People v White*, 212 Mich App 298, 309; 536 NW2d 876 (1995). A statute may be challenged for vagueness on the grounds that it does not provide fair notice of the conduct proscribed. *Id.* To give fair notice, a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited. *People v Noble*, 238 Mich App 647, 652; 608 NW2d 123 (1999).

MCL 777.57 states: “[p]rior record variable 7 is subsequent or concurrent felony convictions.” The statute goes on to provide that 20 points should be assessed where “[t]he offender has 2 or more subsequent or concurrent convictions,” ten points should be assessed where “[t]he offender has 1 subsequent or concurrent conviction,” and zero points should be assessed where “[t]he offender has no subsequent or concurrent convictions.” MCL 777.57. The statute provides fair notice of the conduct proscribed, namely, the commission of additional felonies concurrent to or subsequent to the sentencing offense. That this statute is part of the *prior* record variable scheme does not render it vague or unclear, nor does it prevent a person of

⁴ The prosecution claims that the trial court erroneously assessed ten points for PRV 7, which is scored for concurrent or subsequent felony convictions, when it should have assessed 20 points. MCL 777.57. Ten points are appropriate where there is one subsequent or concurrent felony conviction; 20 points are appropriate where there are two or more subsequent or concurrent felony convictions. MCL 777.57. The prosecution claims that the possession with intent to deliver conviction should have been used to assess additional points under PRV 7 because the conviction was entered after the sentencing offense was committed. The PSIR confirms the fact that defendant did have a possession with intent to deliver conviction three months after the sentencing offense was committed. However, it is unclear that the trial court did not base its ten point PRV 7 score on that very conviction. The prosecution does not indicate, nor does the record make clear, which conviction was relied upon by the trial court to assess ten points under PRV 7. In the absence of confirmation on this point, we will not disturb the trial court’s score.

ordinary intelligence from understanding what is prohibited. Defendant's void for vagueness claim is without merit.

Defendant contends that his trial counsel was ineffective. We disagree.

The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to the effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) this error was so prejudicial to the defendant that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Defendant asserts that counsel erred in failing to determine whether the jail phone tapes represented an accurate rendition of his phone conversations. Also, had counsel listened to the tapes in their entirety, he would have discovered highly exculpatory information. Defendant's claims are unpersuasive. At trial, defendant stipulated to the process that was undertaken to convert the recordings to the discs listened to by the jury. Defendant does not give any specific indication that the tapes heard by the jury were inaccurate. Also, the allegedly exculpatory impeachment evidence that defendant asserts is on the missing tapes is not exculpatory, as explained above. Defendant does not specify any additional exculpatory evidence that might be on the tapes. Defendant cannot demonstrate error here.

Defendant maintains that his counsel erred in failing to pursue a defense of third-party culpability. Defendant argues that the record was replete with evidence that Moore committed the shooting, or, at a minimum, participated in it. Defendant alleges that Moore fled from the scene and got rid of his shirt and shoes before seeking help. Moore testified that he fled from the van because he had witnessed defendant shoot Mullinax and he was frightened for his own life. Dawson encountered Moore after the shooting and testified that defendant was wearing a shirt. The jury believed Moore's account, supported by Dawson, that he was a witness to the shooting. There was no error by counsel here.

Defendant contends that counsel erred in failing to challenge the pretrial identification of him by Blakely and Smith. This claim was discussed above and found to have no merit. Counsel was not ineffective for failing to lodge a meritless objection. See *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995).

Defendant claims that counsel erred by failing to cross-examine Officer Jimenez regarding how he procured the identity of defendant as the shooter. The officer testified that, pursuant to Moore's and Dawson's statements, he determined a man nicknamed Jay allegedly committed the shooting. At the early stages of the investigation, Officer Jimenez did not know what Jay's real name was. The officer testified that, through the use of connections and informants, Jay was discovered to be defendant. Even assuming that non-testifying witnesses Blakely and Smith were the first ones to identify defendant as Jay, it is unclear why this would

be damaging to the prosecution's case, particularly where Moore testified unequivocally at trial that Jay was defendant. There was no error on these facts.

Defendant further argues that counsel erred in failing to object to the scoring of PRV 7 and OV 8. Regarding PRV 7, defendant contends that it is void for vagueness and its application results in impermissible double counting. We have already concluded that this argument is not persuasive. With respect to OV 8, defendant argues that there was no evidence to support a finding that Mullinax was asported to a place of greater danger as required by MCL 777.38(1)(a). According to Moore, defendant was with Mullinax in a van around midnight. Defendant then turned around and shot Mullinax. Because the shooting occurred in a van at night, it is unlikely that any passers by could have observed the murder. Mullinax's body was then dumped near the driveway of a vacant house. There was enough evidence to support the trial court's OV 8 score. See *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003) (stating that the sentencing court's scoring should be upheld if there is any support in the record for it). Counsel was not ineffective for failing to object on these points. See *Rodriguez*, 212 Mich App at 356.

We affirm defendant's convictions, and remand to the trial court for resentencing on the second-degree murder conviction in accordance with this opinion.

We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Douglas B. Shapiro